A

KNM Process Systems Sdn Bhd v Cypark Sdn Bhd

B HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24C(ARB)-2–02 OF 2020
WONG KIAN KHEONG J
4 JUNE 2020

C *Civil Procedure — Injunction — Interim injunction — Application for interim injunction pending arbitration — Plaintiff applied for interim injunction to restrain defendant's rights under two bank guarantees — Whether court may grant interim injunctions regarding bank guarantees on a condition that the party who caused the issuance of the bank guarantees shall ensure that the bank guarantees* D *were renewed and could be enforced until the issuance of the final arbitral award — Whether Arbitration (Amendment) (No 2) Act 2018 ('Act A1569') had narrowed scope of court's discretionary power to grant interim measures pursuant to s 11(1)(a) to (e) of the Arbitration Act 2005 — Whether plaintiff could file originating summons without joining another party to the contract as co-plaintiff* E *— Whether court should stay enforcement of condition pending plaintiff's appeal against court's decision — Arbitration Act 2005 ss 2(1), 9, 11(1) — Rules of Court 2012 O 1A, O 2 r 1(2), O 15 r 6(1) & O 29 r 1*

The plaintiff and Hitachi Zosen Corporation of Japan ('Hitachi') had formed F a consortium named SHK Consortium ('the Consortium'). The defendant had awarded a contract for 'Engineering, Procurement, Construction and Commissioning' to the Consortium to perform a portion of a project known as 'Solid Waste Modular Advanced Recovery and Treatment Systems Waste Management Solutions' ('the project'). In this regard, the plaintiff was G responsible for the onshore portion of the contract whereas Hitachi was responsible for the offshore portion of the contract. Problems arose with regards to the performance of the contract by the plaintiff which eventually led to termination of the contract and the calling of two bank guarantees ('the two BG') by the defendant. In response, the plaintiff had filed originating H summons ('encl 1') and three other applications under encls 3, 28 and 35 ('three encls'). Enclosure 1 and three encls concerned the exercise of the court's discretion to grant interim injunctions to restrain the defendant's rights under the two BG pursuant to s 11(1)(a) and/or (b) of the Arbitration Act 2005 ('the AA') pending the commencement and disposal of arbitration which had been I agreed to by the parties in this case ('the arbitration'). The issues arose were: (a) whether the court may grant interim injunctions regarding the two BG on a condition ('the condition') that the party who had caused the issuance of the two BG shall ensure that the two BG were renewed and could be enforced until the issuance of the final arbitral award in the arbitration ('final award'); (b)

whether the Arbitration (Amendment) (No 2) Act 2018 ('Act A1569') had narrowed the scope of the court's discretionary power to grant interim measures pursuant to s 11(1)(a)–(e) of the AA; and (c) whether the plaintiff could file the originating summons without joining Hitachi as co-plaintiff. In the present case, after the court had orally pronounced the amended order on 28 March 2020, the plaintiff had made an oral application to stay the enforcement of the condition pending the disposal of the plaintiff's appeal to the Court of Appeal against the amended order.

Held:

(1) The Consortium was not a legal entity which was competent to contract. The contract was made between the plaintiff and Hitachi on one part and the defendant on the other part. More importantly, the contract had demarcated the onshore portion (which involved the plaintiff) from the offshore portion (which concerned Hitachi). In other words, the plaintiff could file this originating summons regarding the onshore portion without joining Hitachi as a co-plaintiff. Further, according to O 1A and O 2 r 1(2) of the Rules of Court 2012 ('the ROC'), the ROC (including O 15 r 6(1) of the ROC) shall be administered with regard to the 'overriding interest of justice'. In the present case, the defendant was not prejudiced in any manner by the non-joinder of Hitachi (see para 23).

(2) The court's discretion to grant interim measures under the present s 11(1) of the AA had been curtailed by Act A1569 as compared to the previous s 11(1) of the AA. The court power to grant interim measures was confined to any one or more of its paras (a)–(e). Further, the court could not decide on the merits of the dispute between the parties under the present s 11(1) of the AA because the parties had agreed in their arbitration agreement (as understood in ss 2(1) and 9(1)–(5) of the AA) that all legal and factual issues which arose from their dispute shall only be decided by the arbitral tribunal (see paras 31, 34 & 60).

(3) The court was satisfied that the plaintiff had a valid and arguable cause of action in the form of the defendant's breach of the contract. In addition, the plaintiff had shown that: (a) the two injunctions were ordered under s 11(1)(a) of the AA to maintain the status quo pending the commencement and disposal of the arbitration; (b) the two injunctions were granted pursuant to s 11(1)(a) of the AA to restore the status quo pending the commencement and disposal of the arbitration because the defendant's two calls had already been made; and/or (c) the defendant was restrained by the two injunctions from 'taking action that is likely to cause current or imminent harm or prejudice' to the arbitration within the meaning of s 11(1)(b) (second limb) (see paras 39–40).

(4) Based on the evidence, there existed a 'strong prima facie case' and there was a 'seriously arguable case that the only realistic inference' was the

defendant's two calls were unconscionable as against the plaintiff. The evidence showed that despite the hard rock problem, the defendant had refused to grant extension of time to the plaintiff and in addition to that, the defendant had imposed delay damages on the plaintiff which had resulted to the inability of the plaintiff to pay its subcontractors, suppliers and consultants ('the defendant's conduct'). The defendant's conduct could not be co-incidental but were of such a nature and degree which pricked the 'conscience of a reasonable and sensible' person (see paras 42–44).

(5) Damages were not an adequate relief for the plaintiff in the present case. Firstly, in view of the defendant's conduct, the plaintiff had been deprived of cash flow. In fact, the defendant's conduct had caused the plaintiff to resort to an arrangement for the defendant to pay the plaintiff's subcontractors, suppliers, and consultants. If the court did not grant the two injunctions to preserve the status quo pending the commencement and disposal of the arbitration, the plaintiff would suffer irreparable prejudice by not being financially able to commence and dispose of the arbitration. In other words, if the two injunctions were not ordered, the defendant would have 'won by default' even before the commencement of the arbitration (see para 47).

(6) The balance of convenience lay in favour of granting the two injunctions with the condition because: (a) if the two injunctions with the condition were not granted in this case, there would be a grave injustice to the plaintiff as explained above; and (b) if the court ordered the two injunctions with the condition, there was a less risk of injustice to both the plaintiff and defendant because if the final award favoured the defendant, the defendant could still enforce the two BG; and the defendant was restrained by the two injunctions from receiving the proceeds of the two BG pending the commencement and disposal of the arbitration. Consequently, until the final award was pronounced by the arbitral tribunal, the plaintiff was given some 'breathing space' to commence and dispose of the dispute by way of the arbitration (see para 49).

(7) In the present case, in view of the condition, the court exercised its discretion to exempt the plaintiff from furnishing any undertaking for the two injunctions. Further, the court found that the plaintiff had not failed to fulfil all the requirements of O 29 r 1 of the ROC. There was also no policy or equitable consideration which militated against the grant of the two injunctions with the condition. On totality, the plaintiff had discharged the onus to satisfy the court of the requirements for a grant of the two injunctions with the condition (see paras 50–53).

(8) In the exercise of the court's discretion to grant the appropriate interim measure under s 11(1)(a)–(e) of the AA, the court may impose any

condition in the interest of justice with regard to the interim measure. There was nothing in s 11(1)(a)–(e) of the AA which prevented the court from attaching any condition to the interim measure to be ordered by the court (see para 54).

(9) The court could not stay the execution of the condition pending the disposal of the plaintiff's appeals because special circumstances did not exist with regard to the execution of the condition (see para 59).

[Bahasa Malaysia summary

Plaintif dan Hitachi Zosen Corporation of Japan ('Hitachi') telah membentuk sebuah konsortium bernama SHK Consortium ('Consortium'). Defendan telah memberikan kontrak untuk 'Kejuruteraan, Perolehan, Pembinaan dan Pentauliahan' kepada Consortium tersebut untuk melaksanakan sebahagian dari projek yang dikenali sebagai 'Solid Waste Modular Advanced Recovery and Treatment Systems Waste Management Solutions' ('projek'). Dalam hal ini, plaintif bertanggungjawab untuk bahagian kontrak di darat, sementara Hitachi bertanggungjawab untuk bahagian kontrak di luar pesisir. Masalah timbul berkaitan dengan pelaksanaan kontrak oleh plaintif yang akhirnya menyebabkan penamatan kontrak dan pemanggilan dua jaminan bank ('dua JB') oleh defendan. Sebagai tindak balas, plaintif telah memfailkan saman pemula ('lampiran 1') dan tiga permohonan lain di bawah lampiran 3, 28 dan 35 ('tiga lampiran'). Lampiran 1 dan tiga lampiran tersebut adalah berkaitan dengan pelaksanaan budi bicara mahkamah untuk memberikan injunksi interim untuk menahan hak defendan di bawah dua JB tersebut berdasarkan s 11(1)(a) dan/atau (b) Akta Timbang Tara 2005 ('AT') sementara menunggu permulaan dan pelupusan kes timbang tara yang telah dipersetujui oleh para pihak dalam hal ini ('timbang tara'). Isu-isu yang timbul adalah: (a) sama ada mahkamah boleh memerintahkan injunksi interim mengenai dua JB dengan syarat ('syarat tersebut') bahawa pihak yang telah menyebabkan penerbitan dua JB harus memastikan bahawa dua JB tersebut diperbaharui dan dapat dikuatkuasakan sehingga pemberian award muktamad timbang tara dalam timbang tara tersebut ('award muktamad'); (b) sama ada Akta Timbang Tara (Pindaan) (No 2) 2018 ('Akta A1569') telah mengurangkan ruang lingkup kuasa budi bicara mahkamah untuk memberikan perintah interim menurut s 11(1)(a)–(e) AT; dan (c) sama ada plaintif boleh memfailkan saman pemula tanpa memasukkan Hitachi sebagai plaintif bersama. Dalam kes ini, setelah mahkamah memberikan perintah yang dipinda secara lisan pada 28 Mac 2020, plaintif telah memfailkan permohonan lisan untuk menangguh pelaksanaan syarat tersebut sementara menunggu penyelesaian rayuan plaintif ke Mahkamah Rayuan terhadap perintah yang dipinda.

Diputuskan:

(1) Consortium tersebut bukanlah entiti undang-undang yang kompeten untuk membuat kontrak. Kontrak tersebut dibuat antara pihak plaintif

dan Hitachi di satu pihak dan defendan di pihak yang lain. Lebih penting lagi, kontrak tersebut telah membezakan bahagian darat (yang melibatkan plaintif) dari bahagian luar pesisir (yang berkenaan dengan Hitachi). Dengan kata lain, plaintif boleh memfailkan saman pemula ini mengenai bahagian darat tanpa bergabung dengan Hitachi sebagai plaintif bersama. Selanjutnya, menurut A 1A dan A 2 k 1(2) Kaedah-Kaedah Mahkamah 2012 ('KKM'), KKM (termasuk A 15 k 6(1) KKM) mestilah ditadbir dengan memberi perhatian pada 'kepentingan utama keadilan'. Dalam kes ini, defendan tidak diprejudiskan dalam apa cara sekalipun disebabkan oleh kegagalan memasukkan Hitachi sebagai plaintif bersama (lihat perenggan 23).

(2) Budi bicara mahkamah untuk memberikan perintah-perintah interim berdasarkan s 11(1) AT yang berkuatkuasa sekarang telah dikurangi oleh Akta A1569 dibandingkan dengan s 11(1) AT yang sebelumnya. Kuasa mahkamah untuk memberikan perintah-perintah interim terbatas pada salah satu atau lebih daripada perenggan (a)–(e) peruntukan tersebut. Selanjutnya, mahkamah tidak dapat memutuskan merit perselisihan antara pihak-pihak di bawah s 11(1) AT ini kerana pihak-pihak telah bersetuju dalam perjanjian timbang tara mereka (seperti yang difahami dalam ss 2(1) dan 9(1)–(5) AT) bahawa semua permasalahan undang-undang dan fakta yang timbul dari perselisihan mereka hanya akan diputuskan oleh tribunal timbang tara (lihat perenggan 31, 34 & 60).

(3) Mahkamah berpuas hati bahawa plaintif mempunyai kausa tindakan yang sah dan boleh diperdebatkan dalam bentuk pelanggaran kontrak oleh defendan. Sebagai tambahan, plaintif telah menunjukkan bahawa: (a) dua injunksi tersebut diperintahkan di bawah s 11(1)(a) AT untuk mengekalkan status quo sementara menunggu permulaan dan penyelesaian kes timbang tara; (b) dua injunksi tersebut diberikan menurut s 11(1)(a) AT untuk memulihkan status quo sementara menunggu permulaan dan penyelesaian kes timbang tara kerana kedua-dua pemanggilan jaminan oleh defendan telah dilakukan; dan/atau (c) defendan dihalang oleh dua injunksi tersebut untuk 'mengambil tindakan yang mungkin menyebabkan bahaya atau prasangka semasa atau yang akan berlaku' kepada timbang tara dalam maksud s 11(1)(b) (bahagian kedua) (lihat perenggan 39–40).

(4) Berdasarkan keterangan, terdapat 'kes prima facie yang kukuh' dan 'kes yang dapat diperdebatkan dengan serius bahawa satu-satunya kesimpulan yang realistik' adalah dua panggilan jaminan oleh defendan adalah tidak adil bagi plaintif. Keterangan menunjukkan bahawa walaupun terdapat masalah batuan keras, defendan telah menolak untuk memberikan tambahan waktu kepada plaintif dan di samping itu, defendan telah mengenakan ganti rugi kelewatan ke atas plaintif yang

mengakibatkan ketidakmampuan pihak plaintif membayar subkontraktornya, pembekal dan perunding ('tindakan defendan'). Tindakan defendan bukanlah berlaku secara kebetulan tetapi bersifat dan pada tahap yang mengguris 'hati nurani orang yang munasabah dan berakal' (lihat perenggan 42–44).

(5) Ganti rugi bukanlah relif yang berpatutan bagi plaintif dalam kes ini. Pertama, disebabkan oleh tindakan defendan, plaintif telah kehilangan aliran tunai. Malahan, tindakan defendan telah menyebabkan plaintif terpaksa membuat pengaturan agar defendan membayar subkontraktor, pembekal, dan perunding plaintif. Sekiranya mahkamah tidak memberikan dua injunksi tersebut untuk mempertahankan status quo sementara menunggu permulaan dan penyelesaian kes timbang tara, plaintif akan menanggung prejudis yang tidak dapat diperbaiki apabila tidak mampu dari segi kewangan untuk memulakan dan menyelesaikan kes timbang tara. Dengan kata lain, jika kedua injunksi tersebut tidak diperintahkan, defendan akan 'menang tanpa bertanding' bahkan sebelum bermulanya timbang tara (lihat perenggan 47).

(6) Imbangan kemudahan berpihak kepada pemberian kedua-dua injunksi dengan syarat kerana: (a) jika kedua-dua injunksi bersyarat tersebut tidak diberikan dalam kes ini, akan terjadi ketidakadilan yang serius terhadap plaintif seperti yang dijelaskan di atas; dan (b) jika mahkamah memerintahkan kedua-dua injunksi bersyarat tersebut, terdapat risiko ketidakadilan yang lebih rendah terhadap kedua-dua plaintif dan defendan kerana jika award muktamad memihak kepada defendan, defendan masih boleh menguatkuasakan dua JB tersebut; dan defendan dihalang oleh dua injunksi tersebut untuk menerima hasil dari dua JB tersebut sementara menunggu permulaan dan penyelesaian kes timbang tara. Akibatnya, sementara menunggu award muktamad diberikan oleh tribunal timbang tara, plaintif diberikan 'ruang bernafas' untuk memulakan dan menyelesaikan perselisihan tersebut melalui timbang tara (lihat perenggan 49).

(7) Dalam kes ini, mengambil kira syarat tersebut, mahkamah menggunakan budibicaranya untuk mengecualikan plaintif dari memberikan akujanji untuk kedua-dua injunksi tersebut. Selanjutnya, mahkamah mendapati bahawa plaintif tidak gagal memenuhi semua syarat A 29 k 1 KKM. Tidak ada polisi atau pertimbangan yang adil yang bertentangan dengan pemberian dua injunksi bersyarat tersebut. Secara keseluruhan, plaintif telah melepaskan tanggungjawab untuk memuaskan mahkamah mengenai syarat-syarat untuk pemberian dua injunksi bersyarat tersebut (lihat perenggan 50–53).

(8) Dalam menjalankan budi bicara mahkamah untuk memberikan perintah interim yang sesuai di bawah s 11(1)(a)–(e) AT, demi kepentingan keadilan, mahkamah boleh mengenakan apa-apa syarat

yang berkaitan dengan perintah interim tersebut. Tidak ada apa-apa dalam s 11(1)(a)–(e) AT yang menghalang mahkamah untuk mengenakan apa-apa syarat ke atas perintah interim yang akan diperintahkan oleh mahkamah (lihat perenggan 54).

(9) Mahkamah tidak boleh menangguhkan pelaksanaan syarat tersebut sementara menunggu penyelesaian rayuan plaintif karena tidak wujud keadaan istimewa yang berkaitan dengan pelaksanaan syarat tersebut (lihat perenggan 59).]

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241, SC (refd)

Bumi Armada Navigation Sdn Bhd v Mirza Marine Sdn Bhd [2015] MLJU 953; [2015] 5 CLJ 652, HC (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 4 CLJ 1, FC (refd)

Malayan Banking Bhd v Gan Bee San & Ors and another appeal (SKS Foam (M) Sdn Bhd, intervener) [2019] 2 MLJ 137; [2019] 1 CLJ 575, FC (refd)

Mohd Hairie Haiqal Bhadif Sagas v Mohd Zani bin Che Din & Ors [2020] MLJU 397; [2020] AMEJ 260, HC (refd)

SS Precast Sdn Bhd v Serba Dinamik Group Bhd & Ors [2020] MLJU 400; [2020] 3 AMR 615, HC (refd)

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 507, FC (refd)

Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1, FC (refd)

Legislation referred to

Arbitration Act 1996 [UK] s 44

Arbitration Act 2005 ss 2(1), (1)(a), (1)(b), (1)(c), 2(2)(a)(i), (2)(a)(ii), 9(1), (2), (3), (4), (5), 11, 11(1), (1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(h), (3)

Courts of Judicature Act 1964 s 73

Federal Constitution art 5(1)

Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) Regulations 2020

Rules of Court 2012 O1A, O 2 r 1(2), O 15 r 6(1), O 28 r 9, O 29 r 1, O 32 rr 10, 11, 11(1)

Rules of the Court of Appeal 1994 r 13

Michael Chow Keat Thye (Michael Chow) for the plaintiff.

Nitin Nadkarn (Darshendev Singh and Leong Chee Weng with him) (Lee Hishammuddin Allen & Gledhill) for the defendant.

Wong Kian Kheong J:

A. INTRODUCTION

[1] By consent of parties, this originating summons in court enclosure No 1 ('OS') and three applications in court enclosure Nos 3, 28 and 35 ('encl 3', 'encl 28' and 'encl 35') had been disposed of by way of 'Skype'. This was because one of the two bank guarantees involved in this case ('two BG's') would lapse on 31 March 2020 during the enforcement of the Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) Regulations 2020 ('the PCID'). Enclosures 3, 28 and 35 will be collectively referred to in this judgment as 'three encls'.

[2] This OS and three encls concern the exercise of the court's discretion to grant interim injunctions to restrain the defendant's rights under the two BG's pursuant to s 11(1)(a) and/or (b) of the Arbitration Act 2005 ('the AA') pending the commencement and disposal of arbitration which had been agreed to by the parties in this case ('arbitration'). The novel issue that arises is whether the court may grant interim injunctions regarding the two BG's on a condition that the party who has caused the issuance of the two BG's shall ensure that the two BG's are renewed and can be enforced until the issuance of the final arbitral award in the arbitration ('final award'). In this regard, has the arbitration (Amendment) (No 2) Act 2018 (Act A1569) narrowed the scope of the court's discretionary power to grant interim measures pursuant to s 11(1)(a)–(e) of the AA?

B. BACKGROUND

[3] The plaintiff company ('the plaintiff') and 'Hitachi Zosen Corporation of Japan' ('Hitachi') have formed a consortium named 'SHK Consortium' ('Consortium').

[4] There is a project, 'Solid Waste Modular Advanced Recovery and Treatment Systems Waste Management Solutions' at Ladang Tanah Merah, Negeri Sembilan ('project'). The defendant company ('defendant') has awarded a contract to perform a portion of the project, 'Engineering, Procurement, Construction and Commissioning', to the Consortium ('contract').

[5] According to the contract, among others:

(a) the plaintiff is responsible for the 'onshore' portion of the contract (with a total value of RM137,013,083.50) ('onshore portion') while Hitachi is responsible for its 'offshore' part (with a value of JPY¥3,761,355,000) ('offshore portion'); and

(b) the plaintiff is required to provide the following two BG's to the defendant:

(i) an 'Advance Payment Guarantee' in a sum of RM13.3m ('APG') is provided by the plaintiff to the defendant because the latter has paid in advance RM13.3m to the former. The APG was first issued by Malayan Banking Bhd to the defendant on 3 December 2015 and lapsed on 7 November 2016. A second APG was issued by BNP Paribas Malaysia Bhd ('BNP') to the defendant on 1 November 2016 and would lapse on 31 March 2020; and

(ii) a performance guarantee for an amount of RM13.3m ('PG') was given by Affin Bank Bhd ('ABB') to the defendant and would lapse on 30 September 2022.

[6] The plaintiff has alleged, among others, as follows:

(a) sometime in January 2016, the plaintiff encountered shallow hard rock on the work site ('hard rock problem') which prevented the plaintiff from proceeding with piling works within the meaning of 'Milestone 3' in the contract;

(b) due to the hard rock problem, the plaintiff applied to the defendant for an extension of time ('EOT') but this was refused by the defendant (defendant's refusal (EOT)'). The defendant then imposed damages for the plaintiff's delay in performing the contract in a sum of RM12,150,000 ('delay damages'). The plaintiff has disputed the defendant's claim for delay damages;

(c) by a letter dated 6 April 2018, the consortium decided to suspend work under the contract ('suspension notice'). The defendant has claimed that the suspension notice amounts to a breach of the contract by the Consortium for which the defendant has reserved its right to take action. Upon receipt of the suspension notice, the defendant did not however terminate the contract;

(d) due to the delay damages, the plaintiff could not pay its subcontractors, suppliers and consultants. Hence, the plaintiff entered into an 'Additional Advance Amounts' arrangement with the defendant ('arrangement') wherein:

(i) the defendant paid a sum of RM1,747,791.42 to the plaintiff; and

(ii) the defendant paid directly to the plaintiff's subcontractors, suppliers and consultants ('defendant's payments to plaintiff's creditors (arrangement)'). In this manner:

(1) the defendant had arrogated to itself an 'absolute entitlement' as to when, how and which subcontractors, suppliers and consultants of

the plaintiff should be paid by the defendant under the arrangement; and

(2) the defendant had 'effectively' taken over the performance of the onshore portion from the plaintiff by way of 'micromanagement';

(e) the plaintiff had completed work in respect of 'Milestone 9' on 14 March 2019. However, the defendant had recommended in 'Work Done Certificate' No 12 ('Certificate 12') a negative sum of RM21,455,941.30. In other words, according to Certificate 12, the defendant did not recommend any payment for the plaintiff's completion of Milestone 9 and instead the plaintiff owed RM21,455,941.30 to the defendant;

(f) the defendant attempted to recoup the defendant's payments to plaintiff's creditors (arrangement) by having recourse to the two BG's. The plaintiff objected to such an attempt. Consequently, the defendant relented and did not call on the two BG's as a method to recoup the defendant's payments to plaintiff's creditors (arrangement);

(g) the plaintiff, through the Consortium, had pursued many pressing issues with the defendant regarding the onshore portion;

(h) by a letter dated 8 February 2020, the defendant terminated the contract with the Consortium. On the following day, 9 February 2020, the defendant closed the work site. By way of letters dated 10 February 2020 to BNP and ABB, the defendant issued calls on the two BG's ('defendant's two calls'); and

(i) the defendant's two calls were unconscionable and/or fraudulent because the defendant had deliberately 'engineered' an excuse for the defendant's two calls as follows:

(i) the defendant wrongfully refused to pay the plaintiff for work done with regard to the onshore portion;

(ii) if not for the arrangement, the plaintiff would have been entitled to seek a release of the APG;

(iii) the defendant's unlawful termination of the contract and defendant's two calls were designed to prevent the plaintiff from obtaining work done certificates from the defendant in respect of Milestones 10 and 11; and

(iv) the defendant had also called on the BG's provided by Hitachi ('Hitachi's BG's'). The combined values of Hitachi's BG's are approximately the same as the two BG's. The total value for the two BG's and Hitachi's BG's is RM53.m. The defendant had only paid a total of RM59,496,440.30 to the plaintiff (excluding the defendant's payments to plaintiff's creditors

(arrangement) and delay damages). In other words, if the defendant's two calls are allowed by this court, the defendant would recoup substantially all the payments made by the defendant to the plaintiff.

[7] The defendant denied the above averments by the plaintiff and contended as follows, among others:

(a) the defendant's refusal (EOT) was irrelevant in this case because the plaintiff only applied for EOT until 21 August 2019. The contract was terminated on 8 February 2020 and the onshore portion remained incomplete on that date. Hence, even if the defendant had granted an EOT, there was still a delay of 171 days on the plaintiff's part (delay from 21 August 2019 (lapse of EOT sought by the plaintiff) until 8 February 2020 (date of defendant's termination of the contract));

(b) to ease the Consortium's cash flow problem and purely out of goodwill, the defendant had paid directly a total sum of RM40,545,657.40 to the Consortium's subcontractors, suppliers and consultants ('defendant's payments to consortium's creditors');

(c) the defendant had overpaid a sum of RM55,542,025.99 to the Consortium. Even if the defendant had issued work done certificates for Milestones 10 and 11, there was still an overpayment of RM34,262,025.99 by the defendant to the Consortium;

(d) the defendant did not recoup substantially all the payments made by the defendant to the Consortium by calling on the two BG's and Hitachi's BG's. This is because there is at least a sum of RM76,281,411.68 which is payable by the defendant to complete the outstanding work left by the Consortium under the contract. This sum does not include:

(i) the cost to be incurred by the defendant in rectifying all the defects in the work by the Consortium; and

(ii) the defendant's overpayment to the Consortium;

(e) even if there is an 'excess' from the proceeds of the two BG's and Hitachi's BG's which is due to the Consortium, the Consortium has to recover this excess by way of arbitration as agreed in the contract;

(f) the defendant could not have acted fraudulently and/or unconscionably regarding the defendant's two calls because:

(i) the Consortium had committed various breaches of the contract which led to the defendant's termination of the contract. Such breaches by the Consortium entitled the defendant to call on the PG's provided by the Consortium. The purpose of the PG's is to enable the defendant to use the proceeds of the PG's to rectify the

breaches of the contract which have been committed by the Consortium; and

(ii) the purpose of the APG's is to guarantee the Consortium's repayment of advance payments made by the defendant to the Consortium ('advance payments'). In view of the defendant's termination of the contract, the defendant has no choice but to call on the APG's so as to recoup the advance payments;

(g) the fact that Hitachi has not disputed the defendant's two calls, means that the defendant's two calls have been lawfully made; and

(h) this OS should be struck out because the contract is entered into between the Consortium and defendant. Hence, any action regarding the contract should be filed in the names of both the plaintiff and Hitachi.

C. PROCEEDINGS

C(1). OS and encl 3

[8] The plaintiff prays for the following relief in this OS, among others:

(a) an injunction to restrain the defendant from:

(i) making any call on the two BG's; and

(ii) receiving any of the proceeds of the APG and PG from BNP and ABB respectively;

(b) a declaration that the defendant's two calls are 'wrong in law, fraudulent, unconscionable and/or null and void in law'; and

(b) damages shall be assessed by the court and shall be paid by the defendant to the plaintiff.

[9] In encl 3, the plaintiff applies ex parte for an interlocutory injunction to restrain the defendant from making any call on the two BG's or from receiving any proceeds from the two BG's until the disposal of the OS.

[10] On 14 February 2020, with regard to encl 3, I granted an ex parte interlocutory injunction in the plaintiff's favour.

[11] When learned counsel for the plaintiff and defendant appeared in this court on 24 February 2020:

(a) both parties consent for the OS and encl three to be heard together; and

(b) I granted an ad interim interlocutory injunction in the plaintiff's favour pending the disposal of the OS and encl 3.

[12] On 23 March 2020, after I have perused the written submission of the plaintiff and defendant as well as after hearing their oral submission (through Skype), I made the following order, among others ('first order'):

(a) two injunctions ('two injunctions') are granted to restrain the defendant from:

(i) making any call on the two BG's; and

(ii) receiving any proceeds from the two BG's;

(b) the following two declarations ('two declarations') are made:

(i) the defendant's two calls are unconscionable ('declaration (unconscionability)'); and

(ii) the rightful party to call on the two BG's is Cypark Smart Technology Sdn Bhd ('CST') to whom the benefit of the two BG's has been assigned by the defendant; and

(c) costs of RM25,000 shall be paid by the defendant to the plaintiff ('costs (OS and encl 3)') with 5% interest per annum on the costs (OS and encl 3) from 23 March 2020 until the full payment of the costs (OS and encl 3).

[13] The defendant has filed two appeals (in respect of the OS and encl 3) to the Court of Appeal against the first order ('the defendant's appeals').

C(2). *Enclosures 28 and 35*

[14] In encl 28, the defendant applies for, among others, the following order:

(a) the plaintiff shall ensure the validity and enforceability of the two BG's until three months after the final disposal of the defendant's appeals ('first prayer (encl 28)');

(b) if the court grants the first prayer (encl 28) and if the plaintiff does not ensure the validity and enforceability of the two BG's until three months after the final disposal of the defendant's appeals, the two injunctions and declaration (unconscionability) shall be deemed to be discharged; and

(c) pending the disposal of the defendant's appeals, both the plaintiff and defendant shall have liberty to apply to this court for any further order.

[15] The defendant prays for the following relief, among others, in encl 35:

(a) the plaintiff shall ensure the validity and enforceability of the two BG's until three months after the issuance of the final award ('first prayer (encl 35)');

(b) the two injunctions and declaration (unconscionability) shall be discharged upon the issuance of the final award;

(c) if the court grants the first prayer (encl 35) and if the plaintiff does not ensure the validity and enforceability of the two BG's until three months after the issuance of the final award, the two injunctions and declaration (unconscionability) shall be deemed to be discharged; and

(d) pending the issuance of the final award, both parties shall have liberty to apply to this court for any further order.

[16] After perusing the parties' written submission and after hearing oral arguments by the parties' learned counsel on 28 March 2020 (through Skype), I vary the first order as follows ('amended order'):

(a) the two declarations are set aside;

(b) the two injunctions are granted pending the issuance of the final award;

(c) the two injunctions:

(i) shall be subject to a condition the plaintiff shall ensure at all times that the two BG's are valid and enforceable until the issuance of the final award ('condition'); and

(ii) shall lapse if the condition is not fulfilled by the plaintiff;

(d) the plaintiff and defendant shall have liberty to apply to this court:

(i) to vary the two injunctions; and/or

(ii) for any further interim relief;

(e) costs (OS and encl 3) shall be paid by the defendant to the plaintiff with 5% interest per annum on the costs (OS and encl 3) from 23 March 2020 until the full payment of the costs (OS and encl 3); and

(f) costs for encl 28 and 35 amounting to RM10,000 shall follow the event of the defendant's appeals.

[17] After I had orally pronounced the amended order on 28 March 2020, the plaintiff's learned counsel made an oral application to stay the enforcement of the condition pending the disposal of the plaintiff's appeal to the Court of Appeal against the amended order ('the plaintiff's stay application').

[18] Learned counsel for both parties submitted orally on the plaintiff's stay application. I dismiss the plaintiff's stay application and the reasons for this decision will be given in Part L below.

[19] Two appeals have been lodged by the plaintiff (in respect of encls 28 and 35) to the Court of Appeal against the amended order ('plaintiff's appeals').

D. ISSUES

[20] The following questions arise in this OS and three encls:

(a) as the contract is made between the defendant and Consortium, can the plaintiff file this OS without including Hitachi as a co-plaintiff? This is a novel issue;

(b) whether the court can grant declarations and/or damages in an application for interim measures under s 11(1) of the AA;

(c) how should the court exercise its discretion under s 11(1)(a) and (b) of the AA in respect of a call made on a BG? In this regard:

(i) whether the court should grant the two injunctions pending the issuance of the final award on the following grounds:

(1) the defendant's two calls have been fraudulently made; *and/or*

(2) it is unconscionable to make the defendant's two calls; and

(ii) if the court grants the two injunctions pending the issuance of the final award, can and should the court impose the condition?; and

(d) pending the disposal of the plaintiff's appeals, whether the court should stay the execution of the condition pursuant to s 73 of the Courts of Judicature Act 1964 ('the CJA') and r 13 of the Rules of the Court of Appeal 1994 ('the RCA').

E. DISPOSAL OF OS AND THREE ENCLS BY SKYPE

[21] In this case, the defendant has filed a certificate of urgency to hear OS and encl three before the lapse of APC on 31 March 2020. After the first order was made, the defendant filed encls 28 and 35 on two certificates of urgency. To the credit of the plaintiff's learned counsel, the plaintiff consented to a hearing of disposal of OS and three encls by Skype ('Skype hearing'). I have decided in *SS Precast Sdn Bhd v Serba Dinamik Group Bhd & Ors* [2020] MLJU 400; [2020] 3 AMR 615 at para [21], that parties may consent to a Skype hearing of notices of application ('NA').

[22] Even if the plaintiff had objected to a Skype hearing of OS and three encls, I would still have exercised my discretion under O 28 r 9, O 32 rr 10 and

11 read with O 1A and O 2 r 1(2) of the Rules of Court 2012 ('the RC') to conduct the Skype hearing. O1A, O 2 r 1(2), O 28 r 9, O 32 rr 10 and 11 RC provide as follows:

> O 1A *Regard shall be to justice*
>
> *In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules*.
>
> O 2 r 1(2) *These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective*.
>
> O 28 r 9 *Order for hearing* or trial
>
> Except where the Court disposes of a cause or matter begun by originating summons or orders it to be transferred to a Subordinate Court or makes an order in relation to it under rule 8 or other provisions of these Rules, *the Court shall, on being satisfied that the cause or matter is ready for determination, make an order for the hearing* or trial thereof in accordance with this rule.
>
> O 32 r 10 *Reference of matter to Judge*
>
> The Registrar may refer to a Judge any matter which he thinks should properly be decided by a Judge, and *the Judge may* either *dispose of the matter* or refer it back to the Registrar, as the case may be, *with such directions as he thinks fit.*
>
> O 32 r 11(1) *Power to direct hearing in Court*
>
> *A notice of application* or an appeal *shall be heard in Chambers, subject to* any express provision of these Rules, any written law, *any direction of the Court* or any practice direction for the time being issued by the Chief Judge.
>
> (2) Any matter heard in Court in accordance with paragraph (1) may be adjourned from Court into Chambers. (Emphasis added.)

There are three reasons for me to conduct a Skype hearing of OS and three encls, namely:

(a) the defendant has a constitutional right to have access to justice as guaranteed by art 5(1) of the Federal Constitution (fundamental right of access to justice) — please see the Federal Court's judgment delivered by Gopal Sri Ram FCJ in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507 at para [4];

(b) if the court does not conduct a Skype hearing of OS and three encls, this will be contrary to the defendant's fundamental right of access to justice. It is decided in *SS Precast* at para [43] as follows:

> [43] *If I have decided that the court cannot hold a VC if a party (X) applies for the VC and the opposing party does not consent to the VC, this will not only cause an injustice to X but will also render illusory X's fundamental right under Article 5(1) FC to have access to justice*. (Emphasis added.); and

(c) if this OS and encl three were not disposed before 31 March 2020, the APG would have lapsed. In such an event, the defendant would be irreparably prejudiced even before the commencement of the arbitration. It was therefore only just to conduct a Skype hearing of OS and encl three as mandated by O 1A and O 2 r 1(2) of the RC. In the interest of justice:

(i) NA's may be disposed of by the court through Skype pursuant to O 32 rr 10 and 11(1) of the RC — please refer to *SS Precast* at para [40]; and

(ii) the court has a discretion to hear OS by way of Skype under O 28 r 9 RC (*the Court shall, on being satisfied that the cause or matter is ready for determination, make an order for the hearing*).

F. CAN THE PLAINTIFF FILE THIS OS WITHOUT JOINING HITACHI AS CO-PLAINTIFF?

[23] I am not able to accede to the contention by the defendant's learned counsel that since the contract is entered into between the Consortium and defendant, the OS should be struck out because the plaintiff has failed to join Hitachi as a co-plaintiff in this case ('non-joinder of Hitachi'). My reasons are as follows:

(a) the Consortium is not a legal entity which is competent to contract. The contract is made between the plaintiff and Hitachi on one part and the defendant on the other part. More importantly, the contract has demarcated the onshore portion (which involves the plaintiff) from the offshore portion (which concerns Hitachi). In other words, the plaintiff can file this OS regarding the onshore portion without joining Hitachi as a co-plaintiff;

(b) O 15 r 6(1) of the RC provides as follows:

> O 15 r 6(1) Misjoinder and *non-joinder of parties*
>
> *A cause or matter shall not be defeated by reason of the* misjoinder or *non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter*. (Emphasis added.)

It is clear from O 15 r 6(1) of the RC that the OS and encl three 'shall not be defeated by reason' of the non-joinder of Hitachi — please refer to *Mohd Hairie Haiqal Bhadif Sagas v Mohd Zani bin Che Din & Ors* [2020] MLJU 397; [2020] AMEJ 260 at para [17]; and

(c) according to O 1A and O 2 r 1(2) of the RC, the RC (including O 15 r 6(1) of the RC) shall be administered with regard to the 'overriding interest of justice'. I fail to see how the defendant is prejudiced in any

manner by the non-joinder of Hitachi.

G. SCOPE OF THE COURT'S DISCRETION UNDER S 11(1) OF THE AA

G(1). The postion before introduction of Act A1569

[24] Act A1569 came into effect on 8 May 2018. Prior to the enforcement of Act 1569, s 11 of the AA provided as follows:

> 11 Arbitration agreement and *interim measures by High Court*
>
> (1) *A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for*:
>
> (a) security for costs;
>
> (b) discovery of documents and interrogatories;
>
> (c) giving of evidence by affidavit;
>
> (d) appointment of a receiver;
>
> (e) securing the amount in dispute;
>
> (f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute;
>
> (g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
>
> (h) *an interim injunction or any other interim measure.*
>
> (2) *Where a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application.*
>
> (3) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia. (Emphasis added.)

[25] Arbitration (Amendment) Act 2011 (Act A1395) has only amended a part of s 11(1)(e) of the AA and introduced a new sub-s 11(3) of the AA.

[26] In the United Kingdom (UK), s 44 of the Arbitration Act 1996 ('the AA (UK)') provides for the court's power 'in support of arbitral proceedings'. Section 44 of the AA (UK) states as follows:

> 44 *Court powers exercisable in support of arbitral proceedings.*
>
> (1) *Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.*
>
> (2) Those matters are —

(a) the taking of the evidence of witnesses;

(b) the preservation of evidence;

(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings —

(i) for the inspection, photographing, preservation, custody or detention of the property, or

(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;

and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

(d) the sale of any goods the subject of the proceedings;

(e) *the granting of an interim injunction* or the appointment of a receiver.

(3) *If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets*.

(4) *If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties*.

(5) *In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively*.

(6) *If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order*.

(7) *The leave of the court is required for any appeal from a decision of the court under this section*. (Emphasis added.)

[27] *Bumi Armada Navigation Sdn Bhd v Mirza Marine Sdn Bhd* [2015] MLJU 953; [2015] 5 CLJ 652 concerned an application for a Mareva injunction to aid an arbitration under the previous s 11(1) of the AA (before the enforcement of Act A1569) ('previous s 11(1) of the AA'). I have decided in *Bumi Armada Navigation* at para [44], that the previous s 11(1) of the AA is different from s 44AA (UK). The Court of Appeal has affirmed the decision in *Bumi Armada Navigation*.

[28] In *Bumi Armada Navigation* at paras [46]–[47], I have expressed the following view regarding the court's discretionary powers under the previous s 11(1) of the AA:

[46] *I am mindful of s 8 of the AA which embodies a 'minimalist' approach by our courts as explained by David Wong JCA in the Court of Appeal case of Capping Corp Ltd & Ors v Aquawalk Sdn Bhd & Ors [2013] 6 MLJ 579 at pp 588–589. Section 8 of the AA has been amended by the Arbitration (Amendment) Act 2011 (2011 Amendment*

Act) and now reads as follows:

> *No court shall intervene in matters governed by [AA] except where so provided in [AA]*. (Emphasis added.)

In my opinion, s 11(1) of the AA expressly allows judicial 'intervention' in a very limited form — the court may grant interim (and not permanent) relief pending the disposal of arbitration. The court's power to grant interim relief, does not —

(a) deprive parties of their freedom to contract and to agree to resolve disputes by way of arbitration; and

(b) usurp the role and function of an 'arbitral tribunal' (defined in s 2(1) of the AA as 'a sole arbitrator or a panel of arbitrators') to decide the merits of the dispute in question.

[47] *Despite the width of s 11(1) of the AA, I am of the opinion that an applicant for interim relief under s 11(1) AA before the commencement of any arbitral proceedings, should satisfy the court of the 5 following matters (5 Matters)*:

(a) *the applicant must have a cause of action against the party whom interim relief is sought …*;

(b) *there must be an 'arbitration agreement' as understood in ss 2(1) and 9(1) to (5) AA*;

(c) *the relief sought must be interim in nature and cannot be permanent in effect — Metrod (Singapore) Pte Ltd …*

(d) *the interim relief must support, assist, aid and/or facilitate the proposed arbitral proceedings — Metrod (Singapore) Pte Ltd. If arbitral proceedings are not subsequently commenced or if the interim relief in question does not support, assist, aid and/or facilitate the proposed arbitral proceedings —*

  (i) *the application for and the granting of interim relief may constitute an abuse of court process. …*

  (ii) *the interim relief granted may oppress the party who is the subject matter of the interim relief. …*

(e) *arbitral proceedings should be commenced within a reasonable time. Any unreasonable delay in the commencement and/or conduct of arbitral proceedings may —*

  (i) *constitute an abuse of court process; and/or*

  (ii) *oppress the party who is the subject matter of the interim relief.*

The applicant for interim relief from court, should adduce affidavit evidence to show reasons —

(1) *why arbitral proceedings cannot be commenced within a reasonable time and hence, the need to apply to court for interim relief under s 11(1) AA; or*

(2) *if arbitral proceedings have already been instituted, why the applicant is not able to apply for interim relief from the arbitral tribunal and needs to apply to court for such relief.* (Emphasis added.)

G(2). Effect of Act 1569

[29] Act A 1569 has substituted sub-s 11(1) of the AA as follows:

> 11 *Arbitration agreement and interim measures by High Court*
>
> (1) *A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to —*
>
> (a) *maintain or restore the status quo pending the determination of the dispute*;
>
> (b) *take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process*;
>
> (c) provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
>
> (d) preserve evidence that may be relevant and material to the resolution of the dispute; or
>
> (e) provide security for the costs of the dispute. (Emphasis added.)

[30] Firstly, the present s 11(1)(a)–(e) of the AA (present s 11(1) of the AA) is worded differently from s 44 of the AA (UK). Hence, UK cases on s 44 of the AA (UK) have to be read with caution with regard to the present s 11(1) of the AA.

[31] Regarding the present s 11(1) of the AA, I am of the following view:

(1) the court had wide powers under the previous s 11(1) of the AA, especially in its para (h) (the court could award 'an interim injunction or any other interim measure'). In contradistinction to the previous s 11(1) of the AA, the court's power to grant interim measures pursuant to the present s 11(1) of the AA is confined to any one or more of its paras (a)–(e). In other words, the scope of the court's power under the present s 11(1) of the AA is narrower as compared to its power pursuant to the previous s 11(1) of the AA. As such, Malaysian cases decided under the previous s 11(1) of the AA may not necessarily apply to the present s 11(1) of the AA;

(2) the use of the word 'may' in the present s 11(1) of the AA clearly shows that the court has a discretion to grant any interim measure under s 11(1)(a)–(e) of the AA. Needless to say, from the view point of the stare decisis doctrine, the court's decision on the exercise or non-exercise of its discretion under the present s 11(1) of the AA does not constitute a binding legal precedent;

(3) as expressly provided in the present s 11(1) of the AA, the court may grant interim measures 'before or during arbitral proceedings';

(4) according to s 11(3) of the AA, the court may grant interim measures pursuant to the present s 11(1) of the AA before or during an 'international arbitration' (as understood in s 2(1)(a) to (c), s 2(2)(a)(i) and (ii) of the AA);

(5) the court cannot decide on the merits of the dispute between the parties under the present s 11(1) of the AA because the parties have agreed in their 'arbitration agreement' (as understood in ss 2(1) and 9(1)–(5) of the AA) that all legal and factual issues which arise from their dispute shall only be decided by the 'arbitral tribunal' (as defined in s 2(1) of the AA). This is fortified by s 11(2) of the AA which provides that where a party applies to court for any interim measure after an arbitral tribunal has made a finding of fact, the court 'shall' treat the factual finding as 'conclusive' for the purposes of the application under the present s 11(1) of the AA.

Although the court cannot decide on the merits of a dispute under the present s 11(1) of the AA, in deciding an application under the present s 11(1) of the AA, the court has to assess the evidence and decide the following two matters ('court's decision (interim measure)'):

(a) whether an applicant for interim measure has met the requirements for seeking the interim measure as laid down in s 11(1)(a)–(e) of the AA; and

(b) whether the court should exercise its discretion to grant the interim measure sought for.

The reasons and reasoning of the court's decision (interim measure) do not bind the arbitral tribunal in any manner. Nor are parties bound or estopped in the arbitral proceedings by the reasons and reasoning of the court's decision (interim measure);

(6) based on the words 'interim measure' in the present s 11(1) of the AA, the court may only grant interim measure and not permanent or final relief. This is understandable because since the arbitral tribunal is the sole arbiter of the dispute between the parties (please refer to the above sub-para (5)), final relief should only be given by the arbitral tribunal in the form of a final award and not by the court;

(7) an applicant for interim measure under the present s 11(1) of the AA has the legal and evidential burden to satisfy the court to exercise its discretionary power to grant any interim measure under s 11(1)(a)–(e) of the AA; and

(8) after the court has granted any interim measure under the present s 11(1) of the AA, parties may apply to court to vary or discharge the interim measure if there is a subsequent and material change of relevant circumstances ('subsequent event'). In *Bumi Armada Navigation* at (47(d) and (e)), I have given examples of a subsequent event for the

court to vary or discharge the interim measure.

G(3). Whether the court can grant interim injunction regarding a BG

[32] I am of the following opinion regarding the question of whether a party to an arbitration agreement (X) may apply to court for an interim injunction to restrain a beneficiary of a BG (Y) from making a call on the BG or from receiving any proceeds from the BG pending the commencement and disposal of an arbitration between X and Y ('interim injunction'):

(a) the court has a discretion under s 11(1)(a) and/or (b) of the AA to grant the interim injunction in any one or more of the following three circumstances ('three circumstances'):

(i) the interim injunction is granted pursuant to s 11(1)(a) of the AA to 'maintain' the status quo pending the disposal of the arbitration;

(ii) the interim injunction is ordered under s 11(1)(a) of the AA to 'restore' the status quo pending the disposal of the arbitration; *or*

(iii) by reason of the second limb of s 11(1)(b) of the AA (s 11(1)(b) (second limb)), Y is refrained by the interim injunction from 'taking action that is likely to cause current or imminent harm or prejudice to the arbitral process'; and

(b) X has the burden to satisfy the court of the following eight matters ('eight matters') when X applies for an interim injunction against Y (X's application):

(i) X has a valid and arguable cause of action against Y (X's cause of action). X is only required to show to the court a valid and arguable X's cause of action because only the arbitral tribunal can finally decide on the existence of X's cause of action — please see the above sub-para 31(5).

The present s 11(1) of the AA does not expressly require a valid and arguable X's cause of action as a condition for X's application. However, such a requirement is necessarily implied in the present s 11(1) of the AA. This is because if there is no valid and arguable X's cause of action, X has no right to commence arbitral proceedings against Y. In such a case, X's application is frivolous, vexatious and/or constitutes an abuse of court process for which Y can apply to the court to strike out X's application;

(ii) the existence of one or more of the three circumstances;

(iii) there are four possible grounds for X to challenge Y's call on a BG ('Y's call'), namely:

(1) Y's call is fraudulent ('first ground');

(2) Y's call is unconscionable ('second ground');

(3) Y's call is contrary to the contract between X and Y ('third ground');

and/or

(4) Y's call does not comply with the BG ('fourth ground').

If X relies on the first and second grounds ('first two grounds'), X has to satisfy the court by applying one of the following two tests, namely:

(A) X has a 'seriously arguable case that the only realistic inference' is Y's call is fraudulent or unconscionable; *or*

(B) X has adduced a 'strong prima facie case' that Y's call is fraudulent or unconscionable.

There is a third test if X is relying on the second ground, namely X must satisfy the court that the 'events or conduct are of such degree such as to prick the conscience of a reasonable and sensible' person.

The above three tests ('three tests') have been laid down by the Federal Court in a judgment delivered by Abdull Hamid Embong FCJ in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1 at paras [33], [36] and [39], as follows:

> [33] *It would seem from the modern authorities we have read, that in the case of on demand letters of guarantee or performance bonds the courts are now more willing to look beyond the fraud exception and consider unconscionability as a separate and independent ground to allow for a restraining order on the beneficiary.*
>
> ...
>
> [36] *We are also in agreement with Mohamad Ariff bin Md Yusof JC in the case of Focal Asia Sdn Bhd when he expressed this opinion on these two exceptions and the test to be applied*:
>
> > *If there is clear evidence of fraud in the underlying contract, or unconscionability, the court can interfere. In these two situations, the integrity and autonomy of the document will not be compromised, since the paying bank will not be directly prevented from acting on the document. It is the beneficiary that is prevented from making a call on the document on these grounds. Nonetheless, the evidence allowing intervention by the court must be clear. I accept the test of 'seriously arguable that the only realistic inference is fraud' as good law in an interlocutory application such as the present.*
>
> ...
>
> [39] *We are of the considered view that the 'seriously arguable and realistic inference' test as used by the learned judicial commissioner in Focal Asia is equally applicable to the extended exception of unconscionability. That test therefore needs to be applied to the relevant material facts before the court. The same test which results in a 'strong prima facie case' was utilised by the Court of Appeal at the intermediate appeal stage. And the Court of Appeal said this of the required burden now rested on the shoulder of Sumatec*:
>
> > *As in the case of fraud, to establish 'unconscionability' there must be placed before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare assertion. Hence, the respondent*

> *has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of 'unconscionability' which would basically mean establishing a strong prima facie case. In other words, the respondent has to place sufficient evidence before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of 'unconscionability' being committed by the beneficiary (the appellant) has been established to an extent sufficient for the court to be minded to order injunction sought. This additional ground of 'unconscionability' should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man.*
>
> *We are in agreement with those propositions.* (Emphasis added.)

If X relies on the third and fourth grounds, X should adduce a 'strong prima facie case' to support those two grounds;

(iv) the remedy of damages is not an adequate remedy for X;

(v) the 'balance of convenience' or the 'balance of justice' lies in favour of the grant of the interim injunction;

(vi) X has provided an undertaking to court to pay damages to Y if the final award is in Y's favour and if Y has suffered any loss due to the interim injunction ('undertaking'). In exceptional circumstances, the court has a discretion to exempt X from furnishing the undertaking;

(vii) X has complied with all the procedural requirements as laid down in O 29 r 1 RC; and

(viii) there is no policy or equitable consideration which militates against the grant of the interim injunction.

H. IS THE PLAINTIFF ENTITLED TO DECLARATIONS AND DAMAGES?

[33] It is not disputed that there is an arbitration agreement between the plaintiff and defendant ('arbitration agreement') that any dispute between them regarding the contract ('dispute') shall be decided by way of arbitration.

[34] As explained in the above sub-para 31(5), in view of the arbitration agreement, the merits of the dispute can only be decided by an arbitral tribunal and not by the court. As such, I should not have made the two declarations in the first order.

[35] When encls 28 and 35 were heard by me, I posed, among others, a question to learned counsel for the plaintiff and defendant on whether I should set aside the two declarations in the first order because the merits of the dispute could only be decided by the arbitral tribunal at the arbitration.

[36] In the finest tradition of the Bar, learned counsel for both parties conceded that the two declarations in the first order should not have been made. Consequently, I varied the first order by setting aside the two declarations.

[37] I should add that the first order had been perfected but the functus officio doctrine does not prevent the court from amending the sealed first order by setting aside the two declarations. This is because the two declarations were clearly contrary to the present s 11(1) of the AA — please see the Federal Court's judgment delivered by Alizatul Khair Osman FCJ in *Malayan Banking Bhd v Gan Bee San & Ors and another appeal (SKS Foam (M) Sdn Bhd, intervener)* [2019] 2 MLJ 137; [2019] 1 CLJ 575 at paras [18]–[21].

[38] For reasons expressed in the above sub-para 31(6), the court cannot grant any final relief in the OS. Hence, I have not acceded to the plaintiff's prayer for damages in this case.

I. WHETHER THE PLAINTIFF HAS SATISFIED THE COURT OF EIGHT MATTERS

I(1). Does the plaintiff have valid and arguable cause of action against the defendant?

[39] I am satisfied that the plaintiff has a valid and arguable cause of action in the form of the defendant's breach of the contract as follows:

(a) it is arguable that the defendant has breached the contract by imposing delay damages; and

(b) arguably, the defendant's termination of the contract is unlawful.

I(2). Whether three circumstances exist

[40] The plaintiff has shown that all the three circumstances are present in this case as follows:

(a) the two injunctions are ordered under s 11(1)(a) of the AA to 'maintain' the status quo pending the commencement and disposal of the arbitration;

(b) the two injunctions are granted pursuant to s 11(1)(a) of the AA to 'restore' the status quo pending the commencement and disposal of the arbitration because the defendant's two calls have already been made on BNP and ABB; *and/or*

A (c) the defendant is restrained by the two injunctions from 'taking action that is likely to cause current or imminent harm or prejudice' to the arbitration within the meaning of s 11(1)(b) (second limb).

I(3). Has the plaintiff satisfied three tests?

B

[41] Firstly, I find there is no 'seriously arguable case that the only realistic inference' is the defendant's two calls are fraudulent. Nor is this court satisfied that there is a 'strong prima facie case' to show that the defendant's two calls are fraudulent.

C

[42] This court is satisfied that despite the defendant's many averments as elaborated in the above para 7, there is a 'seriously arguable case that the only realistic inference' is the defendant's two calls are unconscionable as against the plaintiff. This decision is premised on the following evidence and reasons:

D

(a) despite the hard rock problem:

(i) the defendant refused to grant an EOT to the plaintiff; and

(ii) the defendant imposed delay damages on the plaintiff;

E

(b) as a result of the delay damages:

(i) the plaintiff had completed work for Milestone 9 but the defendant did not recommend any payment for Milestone 9 in Certificate 12 because the defendant had purportedly claimed for delay damages; and

F

(ii) the plaintiff was deprived of payment by the defendant under the contract. Consequently, the plaintiff could not pay its subcontractors, suppliers and consultants. The plaintiff was therefore constrained to enter into the arrangement with the defendant;

G

(c) the arrangement had the following unconscionable effect on the plaintiff:

(i) if not for the arrangement, the plaintiff would have been entitled to seek for a release of the APG from the defendant; and

(ii) the arrangement allowed the defendant to take over effectively the performance of the onshore portion from the plaintiff;

H

(d) the plaintiff had completed work for Milestones 10 and 11. However, the defendant refused to issue work done certificates for Milestones 10 and 11 because the defendant had purportedly terminated the contract; and

I

(e) the defendant had also called on Hitachi's BG's. The combined value for the two BG's and Hitachi's BG's is RM53.2m. The defendant had only paid a total of RM59,496,440.30 to the plaintiff (excluding the defendant's payments to plaintiff's creditors (arrangement) and delay damages). If the court does not grant the two injunctions in this case, the defendant would have recouped

substantially all the payments made by the defendant to the plaintiff even before the commencement of the arbitration!

[43] Additionally or alternatively, I am persuaded by the evidence and reasons stated in the above para 42 that there exists a 'strong prima facie case' that the defendant's two calls are unconscionable.

[44] Lastly, this court is satisfied that the sequence of events and the defendant's conduct as explained in the above para 42 cannot be co-incidental but are of such a nature and degree which pricks the 'conscience of a reasonable and sensible' person.

[45] Initially, I thought the defendant had assigned all its rights under the two BG's to CST. Hence, the court granted a second declaration in the first order that the rightful party to call on the two BG's was CST and not the defendant ('second declaration'). There was however no assignment of the defendant's rights under the two BG's to CST. Hence, the second declaration was set aside and the first order was varied accordingly.

[46] The plaintiff's learned counsel has contended that the defendant's two calls could not name CST as the recipient of the proceeds of the two BG's ('recipient'). I have perused the two BG's. There is nothing in the two BG's which prevents the defendant from naming CST as the recipient, especially when the recipient has a concession from the government regarding the project and CST has provided 100% financing to the defendant for the project.

I(4). Whether damages is a sufficient remedy for the plaintiff

[47] I am satisfied that damages is not an adequate relief for the plaintiff in this case. Firstly, in view of the defendant's conduct as explained in the above para 42, the plaintiff had been deprived of cash flow. In fact, the defendant's conduct in this case had caused the plaintiff to resort to the arrangement for the defendant to pay the plaintiff's subcontractors, suppliers and consultants. If the two injunctions are not granted to preserve the status quo pending the commencement and disposal of the arbitration, the plaintiff will suffer irreparable prejudice by not being financially able to commence and dispose of the arbitration. In other words, if the two injunctions are not ordered in this case, the defendant would have 'won by default' even before the commencement of the arbitration.

I(5). Where does balance of convenience lie?

[48] In the Supreme Court case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 at pp 270–271, Mohd Jemuri

Serjan CJ (Borneo) has decided that where the balance of convenience lies depends on which proposed court order carries a lower risk of injustice. If the granting of an interim restraining injunction carries a lower risk of injustice than a refusal of the interim restraining injunction, the balance of convenience lies in favour of granting the interim restraining injunction. Conversely, if the granting of an interim prohibitory injunction carries a higher risk of injustice than a refusal of the interim prohibitory injunction, the balance of convenience lies against the granting of the interim prohibitory injunction.

[49] I am of the view that the balance of convenience lies in favour of granting the two injunctions with the condition. This decision is premised on the following reasons:

(a) if the two injunctions with the condition are not granted in this case, there will be a grave injustice to the plaintiff as explained in the above para 47; and

(b) if this court orders the two injunctions with the condition, there is a less risk of injustice to both the plaintiff and defendant because:

(i) if the final award favours the defendant, the defendant can still enforce the two BG's; and

(ii) the defendant is restrained by the two injunctions from receiving the proceeds of the two BG's pending the commencement and disposal of the arbitration. Consequently, until the final award is pronounced by the arbitral tribunal, the plaintiff is given some 'breathing space' to commence and dispose of the dispute by way of the arbitration.

I(6). Should the plaintiff provide undertaking?

[50] In view of the condition, I exercise my discretion to exempt the plaintiff from furnishing any undertaking for the two injunctions.

I(7). Has the plaintiff complied with procedural requirements?

[51] I am satisfied that the plaintiff has not failed to fulfil all the requirements of O 29 r 1 of the RC.

I(8). Whether grant of two injunctions is contrary to policy and equity

[52] In this case, there is no policy or equitable consideration which militates against the grant of the two injunctions with the condition.

I(9). Has the plaintiff satisfied court of eight matters?

[53] Premised on the evidence and reasons elaborated in the above Parts I(1) to I(8), the plaintiff has discharged the onus to satisfy the court of the eight matters for a grant of the two injunctions with the condition.

J. CAN THE COURT IMPOSE CONDITION?

[54] I am of the view that in the exercise of the court's discretion to grant the appropriate interim measure under s 11(1)(a)–(e) of the AA, the court may impose any condition in the interest of justice with regard to the interim measure. There is nothing in s 11(1)(a)–(e) of the AA which prevents the court from attaching any condition to the interim measure to be ordered by the court. More importantly, the purpose of the interim measure to be granted by the court pursuant to s 11(1)(a)–(e) of the AA may be attained by way of the court's imposition of a specific condition with regard to the interim measure in question. Hence, a literal and purposive construction of s 11(1)(a)–(e) of the AA supports the court's discretionary power to attach any just condition to the interim measure to be ordered by the court.

[55] In this case, it is in the interest of justice for the court to order the condition. This is because if the condition is not imposed by the court and if the final award is made in the defendant's favour, there will be an injustice in the following manner:

(1) the defendant will be deprived of all its rights under the two BG's; and

(2) the plaintiff is allowed to evade its obligations to furnish the two BG's under the contract.

[56] The condition does not cause any injustice to the plaintiff because this OS cannot relieve the plaintiff's obligations to furnish the two BG's under the contract. As stated in the above sub-para 31(6), the court can only grant interim relief under s 11(1)(a) and/or (b) of the AA in this OS. This court cannot therefore grant any final relief in the form of an exemption of the plaintiff's obligations to furnish the two BG's under the contract. I am unable to see how the condition oppresses the plaintiff in any manner when the plaintiff has agreed in the contract to furnish the two BG's in favour of the defendant.

K. OUTCOME OF OS AND THREE ENCLS

[57] Premised on the above evidence and reasons, the amended order is made. In view of the two injunctions with the condition, encl 28 does not serve any purpose.

L. WHETHER THE PLAINTIFF'S STAY APPLICATION SHOULD BE ALLOWED

[58] I reproduce below s 73 CJA and r 13 RCA:

Section 73 CJA

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from *unless the court below* or the Court of Appeal *so orders* and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

Rule 13 RCA

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from *unless the High Court* or the Court *so orders* and no intermediate act or proceeding shall be invalidated except so far as the Court may direct. (Emphasis added.)

[59] I cannot accede to the plaintiff's stay application because:

(a) the plaintiff has failed to discharge the onus to satisfy this court that there exists special circumstances regarding the execution of the condition so as to justify a stay of execution of the condition pending the disposal of the plaintiff's appeals — please refer to the Federal Court's judgment delivered by Augustine Paul JCA (as he then was) in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1 at 10, 14, 17 and 18; and

(b) if I have allowed the plaintiff's stay application:

(i) this will cause an injustice to the defendant as explained in the above sub-para 55(1); and

(ii) the plaintiff can unlawfully evade its obligations to furnish the two BG's under the contract — please refer to the above paras 55(2) and 56.

M. SUMMARY OF THE COURT'S DECISION

[60] In brief:

(a) by virtue of O 15 r 6(1) of the RC, the OS and encl three shall not be defeated by the non-joinder of Hitachi, especially when the defendant has not suffered any prejudice due to the non-joinder of Hitachi;

(b) the court's discretion to grant interim measures under the present s 11(1) of the AA has been curtailed by Act A1569 as compared to the Previous s 11(1) of the AA;

(c) the court cannot make the two declarations and award damages in this OS;

(d) the plaintiff has satisfied the eight matters for the court to grant the two injunctions pursuant to s 11(1)(a) and/or (b) of the AA, in particular the plaintiff has fulfilled the three tests that the defendant's two calls are unconscionable;

(e) in the court's exercise of its discretion to grant the two injunctions under s 11(1)(a) and/or (b) of the AA, it is only just for the court to attach the condition with the two injunctions; and

(f) the court cannot stay the execution of the condition pending the disposal of the plaintiff's appeals because special circumstances do not exist with regard to the execution of the condition.

Order accordingly.

Reported by Dzulqarnain bin Ab Fatar